Section 332 according to canons of statutory interpretation as expressed in *Louisiana PSC* and other cases supports this conclusion.

As the Supreme Court explained in *Louisiana PSC*, "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."[19] The statutory design of Section 332(c)(3)(A), which preempts state authority over rate and entry regulation of CMRS "[n]otwithstanding sections 152(b) and 221(b) of this title . . . ",[20] shows that states are preempted from regulating intrastate CMRS rates and entry "notwithstanding" and, therefore, "without regard" to any residual jurisdiction a state may claim under Section 2(b) of the Act.[21] This provision also authorizes the Commission to approve or reject state petitions to grandfather existing CMRS rate regulation or apply for new CMRS rate regulation.

The Budget Act's use of the phrase "terms and conditions" to delimit the scope of state authority not otherwise preempted is different from the phrase "terms and conditions" of interconnection. In preserving state authority over "terms and conditions" of CMRS, the Budget Act refers to "such matters as customer billing information and practices and billing disputes and other consumer protection matters."[22] The Commission retains exclusive jurisdiction, however, to ensure that "terms and conditions" of interconnection between LECs and CMRS providers are just, reasonable and nondiscriminatory.[23] Because mutual compensation can be viewed as relating not only to rates but to "terms and conditions" of interconnection, the Commission retains exclusive jurisdiction to ensure the availability of interconnection between LECs and CMRS providers on a just, reasonable and nondiscriminatory basis.[24]

(...continued)
765, 97th Cong., 2d Sess., at 31-2 (1982) reprinted in 1982 U.S.C.C.A.N. 2237 (citing *Fisher's Blend Station Inc. v. Tax Comm'n of Washington State*, 297 U.S. 650, 655 (1936) ("all radio signals are interstate by their very nature"). In the interests of regulatory parity, the Budget Act extends the Title III jurisdictional rule that private mobile services "are interstate by their very nature" to *all* commercial mobile radio services as well.

[19]*See id.*, 476 U.S. at 374.

[20]*See* 47 U.S.C. § 332(c)(3)(A).

[21]*See* GTE *Ex Parte*, at 2.

[22]*See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess., at 260 ("House Report").

[23]See 47 U.S.C. §§ 151, 154(i), and 201.

[24]Because the Budget Act federalizes substantive regulation of CMRS, moreover, the
(continued...)

By preempting state rate and entry authority over CMRS, Section 332 reserves to the Commission jurisdiction to "occupy the field" of substantive CMRS regulation.[25] In *Louisiana PSC*, the Supreme Court stated that "the critical question in any pre-emption analysis is always whether Congress intended that *federal regulation supersede state law*."[26] The Supreme Court's observation in *Louisiana PSC* that, absent Congressionally delegated authority, "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State"[27] further supports the conclusion that Section 332 authorizes the Commission to regulate CMRS.

The forbearance provisions of Section 332(c)(1)(A) also confirm that the overall design of the statute is to vest jurisdiction over CMRS with the Commission. By authorizing the Commission to forbear from enforcing any provision of Title II, except Sections 201, 202 and 208, Section 332(c)(1)(A) places with the Commission the responsibility to determine whether enforcement of any common carriage regulation is necessary "to ensure that the charges, practices, classifications, or regulations for or in connection with [CMRS] are just and reasonable and are not unjustly or unreasonably discriminatory."[28]

Furthermore, Section 332(c)(1)(C) directs the Commission to conduct "annual reports" reviewing competitive market conditions with respect to CMRS. As part of the statutorily required public interest finding the Commission must make prior to specifying a provision for forbearance, Section 332(c)(1)(C) requires the Commission to consider whether forbearance or enforcement of a provision "will promote competitive market conditions" for CMRS providers. By bestowing on the Commission sole responsibility for identifying the "competitive market conditions" to determine whether regulation is necessary to ensure just,

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[24](...continued)
interconnection provided by LECs to CMRS providers is entirely interstate in nature.

[25]*See id*; *see also FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (a preemption clause in the ERISA statute "is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relates [to]' an employee benefit plan governed by ERISA"); *Gade v. Nat'l Solid Wastes Management Ass'n.*, 112 S.Ct.2374, 2384-5 (1992) (OSHA provision authorizing Secretary of Labor to approve or reject state hazardous waste removal regulations based on statutorily specified conditions "assumes that the State loses the power to enforce all of its occupational safety and health standards once approval is withdrawn. The same assumption of exclusive federal jurisdiction in the absence of an approved state plan is apparent . . . ."); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994).

[26]*See id.* 476 U.S. at 369 (emphasis added) (citing *Rice et al. v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

[27]*See Louisiana PSC*, 476 U.S. at 374.

[28]*See* 47 U.S.C. § 332(c)(1)(A)(i).

reasonable and nondiscriminatory rates, Section 332(c)(1)(C) contemplates Commission authority to regulate CMRS, without regard to interstate or intrastate jurisdictional boundaries. Section 332(d), moreover, expressly states that the statutory definitions of the phrases "commercial mobile service" and "private mobile service" are to be "specified by regulation by the Commission," and that the statutory phrases "interconnected service" and "public switched network" are to be "defined by regulation by the Commission."[29] Delegating to the Commission the authority to define what constitutes CMRS, PMRS and "interconnected service," further exhibits Congressional intent as required by *Louisiana PSC* "that Federal regulation supersede state law."[30] Accordingly, the statutory framework established by Sections 2(b) and 332, as amended by the Budget Act, demonstrates Congress's intent to delegate to the Commission exclusive authority to direct CMRS substantive regulation.

Congress's intent to invest the Commission with exclusive authority over CMRS is also manifest in the provisions in the Budget Act that provide the states with an opportunity to petition for rate regulation authority. The Commission has sole authority over CMRS, unless and until a state files a petition for rate regulation authority and the Commission approves it.[31] The Commission also has sole discretion to "grant or deny" any state petition for authority to regulate the rates of CMRS providers. These provisions grant the Commission exclusive authority to decide whether a state has sufficiently proven either that market conditions with respect to CMRS fail to adequately protect intrastate CMRS subscribers from discriminatory or unjust and unreasonable rates or that CMRS is a "replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within [a] State."[32] Even if a state has sufficiently justified grant of a petition for rate regulation authority, the duration of such authority may be limited "as the Commission deems necessary."[33] In either case it is the Commission, using rules it adopted pursuant to its implementation of the Budget Act, that is required to assess any state petitions.

The legislative history also supports the conclusion that the Budget Act confers upon the Commission exclusive jurisdiction over substantive regulation of CMRS providers.

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[29] *See* 47 U.S.C. § 332(d).

[30] *See id.*, 476 U.S. at 369.

[31] 47 U.S.C. § 332(c)(3)(A).

[32] 47 U.S.C § 332(c)(3). This provision (and the Commission's rules) plainly contemplate that a state demonstrate that CMRS service has replaced or has become a substitute for a substantial number of landline telephone subscribers before a petition could be granted. *See* 47 C.F.R. §20.13, State Petitions for authority to regulate rates.

[33] *See* 47 U.S.C. § 332 (c) (3)(A).

The specific jurisdictional provisions of Section 332, according to the House Report, are intended:

> . . . [t]o foster the growth and development of mobile services that, *by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.*[34]

In adopting the Senate's amendment of Section 2(b) to reserve exclusive jurisdiction to the Commission over all substantive regulatory matters involving CMRS, the full Committee explained in the Conference Report that:

> [t]he Senate Amendment contains a technical amendment to Section 2(b) of the Communications Act *to clarify that the Commission has the authority to regulate commercial mobile services.*[35]

These statements reinforce the interpretation that the Budget Act's amendments to Sections 2(b) and 332(c) gave the Commission jurisdiction over CMRS rates and entry without regard to their intrastate nature.

III. The Commission Has Sole Jurisdiction Over CMRS Interconnection Issues Because CMRS Is Part of an Interstate Network.

As discussed above, the Budget Act extends to the Commission exclusive jurisdiction over intrastate CMRS rates, regardless of the physically intrastate nature of the facilities.[36] But, even if the purpose of the Budget Act were not entirely transparent, the Commission and courts have consistently held that jurisdiction over communications services is to be determined by the nature of the communications, not the physical location of facilities. A call carried on intrastate facilities is jurisdictionally an interstate communication, subject to federal regulation, when the call is connected to an interstate network.[37] As shown below, since CMRS is part of an interstate network, CMRS calls are inherently interstate in nature and thus subject to the Commission's sole jurisdiction.

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[34] *See* H.R. Rep. No. 103-111, at 260 (emphasis added).

[35] *See*, H.R. Rep No. 102-213, 103d Cong., 1st Sess. 494, 497 (1993) ("Conference Report") (emphasis added).

[36] *See* 47 U.S.C. §§ 152(b), 332(c)(3)(A).

[37] *See New York Telephone v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980).

For example, in *Bell System Tariff Offerings*, the Commission held that it has exclusive jurisdiction over rates, terms and conditions associated with interconnection to intrastate facilities when the local facilities are "an essential link in [] interstate and foreign communications services."[38] In *Lincoln Telephone*, the Court of Appeals rejected the state's argument that the Commission lacked jurisdiction over Lincoln Telephone because all of the company's facilities were located within the State. The Court of Appeals found that:

> The courts . . . have never adopted such a narrow view of the Commission's jurisdiction. Rather, those facilities or services that substantially affect provision of interstate communication are not deemed to be intrastate in nature even though they are located or provided within the confines of one state.[39]

Consistent with the boundaries on the Commission's jurisdiction as enunciated in *Louisiana PSC*, the Commission has jurisdiction, over rates, terms and conditions of interconnection, even if physically intrastate, when the facilities or services at issue substantially affect provision of interstate CMRS communications.[40] In this regard, both Congress in establishing the CMRS category of services in the Budget Act and the

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[38] *See Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C. 2d 413, 417 (1974) ("Bell System Tariff Offerings"), *aff'd sub nom., Bell Tel. Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir. 1974) (citing *Telerent Leasing Corp.* et al., *Memorandum Opinion and Order*, Docket No. 19808, 45 F.C.C.2d 204, 220 (1974), *aff'd sub nom., North Carolina Util. Comm'rs*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (the Commission exercised exclusive jurisdiction over interconnection of customer premises equipment to the nationwide switched public telephone network); *United Dep't of Defense, et al.*, 38 F.C.C.2d 808 (Review Board, 1973), *aff'd* FCC 73-854 (the Commission asserted exclusive jurisdiction over Dial Restoration Panel ("DRP") equipment that was part of a nationwide defense communications system even though the facilities were used in part for transmission of intrastate communications)).

[39] *See Lincoln Telephone*, 699 F.2d at 1109 n.85 (citing *Idaho Microwave, Inc. v. FCC*, 328 F.2d 556 (D.C. Cir. 1964); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1044-1048 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir..), *cert denied.*, 429 U.S. 1027 (1976)).

[40] Although *Bell System Tariff Offerings* and *Lincoln Telephone* are pre-*Louisiana PSC* decisions, the holding that the Commission possesses exclusive jurisdiction to order interconnection to intrastate facilities remains valid and survives *Louisiana PSC*. In a post *Louisiana PSC* case affirming a Commission decision ro preempt state regulation of BOC enhanced Centrex services, the Court of Appeals stated that "[e]ven if Centrex were a purely intrastate service, the FCC might well have authority to preemptively regulate its marketing if – as would appear here – it was typically sold in a package with interstate services." *See Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 n.7. (D.C. Cir. 1989); *see also Petition of the Continental Telephone Company of Virginia for a Declaratory Ruling that it is not Fully Subject to the Commission's Jurisdiction Under the Communications Act of 1934*, 2 FCC Rcd 5982, 5984 (Com. Car. Bur. 1987); *Declaratory Ruling on Application of Section 2(b)(2) of the Communications Act of 1934 to Bell Operating Companies*, 2 FCC Rcd 1750 (1987).

Commission in implementing the Budget Act have found commercial mobile radio services to form an interstate and nationwide wireless communications network. The legislative history of the interconnection provisions of Section 332 states, for example, that Congress "considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[41] Defining the market for CMRS, moreover, the Commission observed that the "direction is away from a 'balkanized view'" that sees cellular, SMRs, paging, *etc.*, competing in separate markets" and noted that ownership concentration and service offering expansion is moving the majority of the wireless industry toward nationwide geographic markets.[42]

As the Commission has previously recognized, CMRS networks are part of a nationwide wireless "network of networks," and mutual compensation models for interconnection between landline LECs and CMRS providers are essential to the rapid and competitive build out of nationwide wireless networks. The Commission is licensing PCS using Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) that do not respect state boundaries. The Commission holds exclusive jurisdiction over the rules of the road for interconnection between LECs and CMRS providers, and all other issues regarding rates, terms and conditions of interconnection between such providers. This view is entirely consistent with the approach the Commission took in its recent examination of CMRS-to-CMRS interconnection, where the Commission did not attempt to separate interconnection into federal and state portions.[43]

A conclusion that the Commission lacks jurisdiction to regulate local CMRS rates is, therefore, contrary to the jurisdictional realignment of Budget Act and pre-Budget Act case law. Under *Bell System Tariff Offerings* and *Lincoln Telephone* and contrary to the *CMRS Second Report and Order*, the Commission — wholly apart from Section 332(c) — retains jurisdiction under Sections 4(i), 2(b) and 332(a) of the Act to order LECs to tariff rates, terms and conditions for interconnection to CMRS facilities, in spite of any "local" or intrastate aspects of CMRS interconnection rates. As Congress and the Commission now both have officially determined, CMRS is part of the interstate public switched telephone network. Given that interconnection between LECs and CMRS providers, and a mutual compensation model is vital to the competitive deployment of a wireless "network of

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[41] *See* House Report, at 261.

[42] *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, First Report*, FCC 95-317, at ¶¶ 59, 63-4 (released August 18, 1995).

[43] *See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, 9 FCC Rcd 5408, 5460 (1994).

networks," the Commission retains exclusive jurisdiction over rates, terms and conditions of interconnection.

IV. The Commission Must Restate its Jurisdiction to Avoid Confusion.

In the *CMRS Second Report and Order*, the Commission exercised its statutory authority to forbear from applying Section 203 of the Act to require CMRS providers to tariff their rates.[44] In reaching this conclusion the Commission observed that "revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates."[45] As discussed above, this conclusion reflects a pre-Budget Act, traditional Section 2(b) analysis over the scope of the Commission's CMRS jurisdiction that is inaccurate. This jurisdictional statement must be clarified to conform with the Commission's actual jurisdiction over CMRS-to-LEC interconnection.

Several parties seeking clarification or reconsideration have questioned the Commission's jurisdictional findings in the *CMRS Second Report and Order*. For example, McCaw and MCI urge the Commission to clarify that it retains exclusive jurisdiction with regard to mutual compensation between LECs and CMRS providers regardless of the degree of physically intrastate facilities involved. Pursuant to the analysis laid out above, Cox supports such clarification.

The Commission has exclusive jurisdiction to require LECs and CMRS providers to comply with a federal model of mutual compensation for interconnection. The language of the Budget Act demonstrates that Congress has granted the Commission sole authority over the rates, terms and conditions of CMRS interconnection, without regard to the physically intrastate location of facilities or the otherwise intrastate nature of a call. Other jurisdictional theories would nullify Congressional intent to establish an interstate, nationwide wireless "network of networks." There thus is an urgent need to correct the misstatement in the *CMRS Second Report and Order*'s concerning the full extent of the Commission's jurisdiction. The Commission cannot and should not forbear from jurisdiction specifically found to be in the public interest and granted to the Commission by the Budget Act. The Commission rather should state that it has exclusive jurisdiction to adopt uniform federal policy governing rates, terms and conditions associated with CMRS interconnection, regardless of the physically "local" or intrastate situation of CMRS facilities.

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[44] *See Second Report and Order*, 9 FCC Rcd 1411, at 1479-1480 (1994) ("CMRS Second Report and Order").

[45] *See id.*, 9 FCC Rcd at 1480.

COMMISSION PREEMPTION OF INTERCONNECTION RATES

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In 1993, Congress gave the Federal Communications Commission authority to preempt state regulation of the interconnection rates between commercial mobile radio service (CMRS) providers and local exchange carriers (LECs). This legislative action empowers the Commission to create uniform national policy in this vital area. The Telecommunications Act of 1996 explicitly reserves this power.

Strong agency action in this field will continue the historic role the Commission has played in transforming communications in the United States. In 1985, a comprehensive survey of the field noted with favor that over the previous fifteen years, "the FCC, wielding its preemptive power, succeeded in largely

reshaping the domestic telephone industry."[1] It is imperative that the agency continue to use preemption to strengthen our nation's communications system.

This memorandum is divided into two parts. The first demonstrates that, in light of the 1993 legislation and classic preemption principles, the Commission has exclusive power over LEC to CMRS interconnection compensation rates. The second shows why it is particularly appropriate, given the United States Supreme Court's *Chevron* decision and the dangers of inefficient state regulation, that the Commission use this power to create a uniform national standard in this area.

I

The federal preemption power flows from the Supremacy Clause of the United States Constitution, which provides that, "This Constitution, and the Laws

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[1]Richard McKenna, *Preemption Under the Communications Act*, 37 FED. COM. L. J. 1, 4-5 (1985). McKenna explains:

> Over the last fifteen years, the telephone industry in the United States has been transformed. In terms of industry structure, competition, regulation, legal theory and practice, and impact on the consumer, among other things, there are vast differences between the environment of 1984 and of the 1960s. *FCC preemption has been a key factor in bringing about these dramatic changes. Id.* at 2 (emphasis added).

of the United States which shall be made in Pursuance thereof....shall be the supreme Law of the Land....any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[2] One of the "Laws of the United States" that has been given the broadest preemptive power by the Supreme Court has been the Communications Act of 1934, which the Court has interpreted to give the Federal Communications Commission "comprehensive authority," including, for example, "'broad responsibilities' to regulate all aspects of interstate communication by wire or radio...."[3]

In considering the Commission's authority, one must recognize that the Court has held that "[f]ederal regulations have no less pre-emptive effect than federal statutes."[4] Indeed, when "Congress has directed an administrator to exercise his discretion," and he has done so appropriately, a "pre-emptive regulation's force does not depend on express congressional authorization to

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[2]U.S. Const., Art. VI, cl. 2.

[3]Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 700 (1984)(citing United States v. Southwestern Cable Co., 392 U.S. 157, 177-178).

[4]Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141, 153 (1982). *See also* United States v. Shimer, 367 U.S. 374 (1961).

displace state law...."[5] Thus, as the Court emphasized in a unanimous opinion involving the Federal Communications Commission, "if the FCC has resolved to pre-empt an area ... and if this determination 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain ... we must conclude that all conflicting state regulations have been precluded."[6]

It is against this backdrop that we must analyze the question of CMRS - LEC interconnection policy. The Communications Act of 1934 creates a dual regulatory scheme for certain interstate and intrastate communications: Section 152(a) gives the Commission exclusive jurisdiction over "all interstate and foreign communication by wire or radio,"[7] while Section 152(b) limits Commission jurisdiction and thus retains state authority over "charges ... in connection with intrastate communication service by wire or radio...."[8] In 1993, however, Congress

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[5]Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141, 153, 154 (1961).

[6]Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 700 (1984).

[7]*See* 47 U.S.C. §152(a).

[8]*See* 47 U.S.C. §152(b). Of course, technology has blurred the lines between interstate and intrastate matters. *See, e.g.*, Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 360 (1986).

amended the Act in dramatic fashion. Section 332(c)(3), titled "State preemption", now provides that, "Notwithstanding section[] 152(b) ... of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service ... except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[9] The words "entry" and "rates" are, of course, clear; the residual state power over "other terms and conditions" concerns, according to the House Report, such matters as "customer billing information and practices and billing disputes."[10]

The 1993 legislation further emphasized the pre-emption of state authority in two important ways. First, Section 152(b), the source of state power over intrastate matters, now begins with the phrase, "Except as provided in ... section 332 of this title ...."[11] Second, §332(c)(3), after ousting preexisting state authority over rates, enables a state to petition the Commission for authority to regulate the rates for any commercial mobile service, but then provides that if the Commission grants such a

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[9]47 U.S.C. §332(c)(2).

[10]H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 261 (1993).

[11]47 U.S.C. §152(b).

petition, "the Commission shall authorize the State to exercise ... such authority over rates ... *as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.*"[12]

Thus Congress has spoken clearly. Traditional §152(b) state authority over intrastate matters has been displaced in this area. It is the Commission that now makes the vital decisions, including whether or not to authorize further state involvement. The Supreme Court has emphasized in the Communications Act context that "the best way of determining whether Congress intended the regulations of an administration agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."[13] Here such an examination clearly reveals that state law is displaced.

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[12]47 U.S.C. §332(c)(3)(A)(emphasis added). *See also* 47 U.S.C. §332(c)(3)(B) which gives the Commission the power to authorize a state to continue to use preexisting rates for any commercial mobile service.

[13]Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 374 (1986).

The 1996 legislation explicitly retains this structure. An examination of the interconnection provisions of the Telecommunications Act of 1996[14] reveals that the 1993 legislation governs the LEC to CMRS interconnection compensation relationship. Specifically, Section 251 contains a Section 201 savings clause[15] which preserves the Commission's authority to govern LEC to CMRS interconnection.[16] Moreover, state authority under Section 252 to review and approve interconnection agreements is expressly conditioned,[17] in part, by Section

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[14] 47 U.S.C. § 251 (regarding LEC obligations to unbundle their networks and to provide interconnection to competitors); § 252 (requiring state approval of interconnection agreements).

[15] Section 251(i) states that "[n]othing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. § 251(i).

[16] Section 332(c)(1)(B) specifically acknowledges and preserves this authority ("[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act.") 47 U.S.C. § 332(c)(1)(B).

[17] *See, e.g.*, 47 U.S.C. § 252(e)(3) ("Notwithstanding paragraph (2), ***but subject to section 253***, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.") (emphasis added); *see also*, 47 U.S.C. § 252(f)(2).

253 of the Act.[18] Importantly, Section 253(e) states that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers."[19] Thus, state approval under Section 252 is made subject to the state preemption provisions of Section 332.[20]

Viewed generally, the 1993 legislation already performs the functions intended by Congress in enacting Sections 251 and 252, that is, to adopt regulatory policies designed to foster the development of competition in telecommunications. Efforts to graft the 1996 interconnection provisions onto the LEC/CMRS relationship will serve only to undermine the force and effect of Section 332, clearly a result contrary to congressional intent.

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[18] Section 253(a) states, in relevant part, that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

[19] 47 U.S.C. § 253(e).

[20] It is also important to note that while interconnection agreements require prior state approval under Section 252, states must do so in accordance with the regulations established by the Federal Communications Commission under Section 251. 47 U.S.C. § 252(e)(2)(B).

Under familiar preemption doctrine, the 1993 legislation presents an easy case. Preemption, which is a matter of congressional intent,[21] may be express in the terms of a statute,[22] it may be implicit when pervasive federal regulation occupies a field,[23] or it may come about when state and federal laws "actually conflict."[24] State regulation here would create an actual conflict to the extent that it is impossible for the Commission to achieve effective interstate regulation in the face of varying state rules on interconnection compensation.[25] But that issue need not be reached because it surely is clear that §332(c)(3), titled "State preemption", expressly removes state authority over entry and rates and has the federal government occupy the field. There is, of course, nothing novel about federal regulation of intrastate matters that affect the nation as a whole; it was a power recognized by the Supreme Court in the historic case of *Gibbons v. Ogden* in

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[21]Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604 (1991).

[22]*Id.* at 605.

[23]*Id.*

[24]*Id. See generally* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 479 - 501 (2d ed. 1988).

[25]*See* Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 375, n.4, and cases cited therein. *See also* People of the State of California v. Federal Communications Commission, 1996 U.S. App. LEXIS 1234 (9th Cir. January 31, 1996).

1824,[26] and applied by the Court to agency regulation of intrastate rates in *The Shreveport Rate Cases* in 1914.[27] Federal Communications Commission regulation of interconnection rates between commercial mobile radio service providers and local exchange carriers thus carries out congressional intent in a manner fully consistent with our constitutional traditions.

II

A full understanding of the Commission's power and obligation to carry out the 1993 amendments to the Communications Act requires an analysis of the United States Supreme Court's 1984 decision in *Chevron v. Natural Resources*

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[26]22 U.S. (9 Wheat.) 1 (1824). Indeed, not only did Chief Justice Marshall's opinion confirm federal power over internal state laws that affect interstate commerce, but the same outcome was reached in Justice Johnson's concurrence, a remarkable result in light of Johnson's Jeffersonian heritage. *See* Stone, et. al, CONSTITUTIONAL LAW lxv (2d ed. 1991).

[27]234 U.S. 342 (1914). United States v. Lopez, 115 S. Ct. 1624 (1995), which found no congressional power to regulate the mere possession of a firearm in a school zone, is not to the contrary. The Court in *Lopez* stressed that the statute there had "nothing to do with 'commerce' or any sort of economic enterprise...." *Id.* at 1630 - 1631. The Court noted that Congress retained the power to regulate intrastate activities with a substantial affect on interstate commerce, and it explicitly reaffirmed *The Shreveport Rate Cases*. *Id.* at 1629 - 1630.

Defense Council.[28] For if there is any doubt about the Commission's authority in this area, *Chevron* resolves that doubt in the Commission's favor.

Chevron is widely recognized as one of the most important decisions in modern administrative law.[29] The heart of the decision is the Court's recognition of the vital role that administrative agencies properly play in making policy that gives life to congressional enactments:

> In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies....
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail....[30]

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[28]467 U.S. 837 (1984).

[29]*See, e.g.*, Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

[30]467 U.S. 837, 865, 866 (footnotes omitted).

Chevron has particular relevance when an agency's decision is to preempt state law.[31] The interconnection matter at issue here is an important part of the Commission's overall goal of giving life to the congressional mandate to nurture an efficient and effective nationwide communications system. Under the circumstances, the agency's decision to preempt is entitled to particular deference in the courts. As the leading study of the intersection of *Chevron* and preemption found, "preemption entails a close and nuanced analysis of the regulatory scheme in action to determine whether state law prevents the federal scheme from 'being all that it can be.'"[32] The study concluded that in deciding the question of whether Congress intended a statutory scheme to displace state regulation, the courts should defer since "the agency is the better decision-maker to implement that intent."[33]

The practical reasons for this conclusion become all the more clear when one considers what would happen if the Commission remained silent and the industry

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[31] *See, e.g.*, Paul E. McGreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. R. 823 (1995).

[32] *Id.* at 884.

[33] *Id.*

faced undiminished state regulation of interconnection rates. As technology develops, not only will the rates themselves hamper the growth of modern communications, but costly litigation could arise as out-of-state companies that believe they are the victim of discriminatory treatment by state regulators raise dormant commerce clause claims in federal court.[34] Litigation in this area is complex and often unpredictable, since it forces the courts to decide, given the absence of federal action, whether state laws, standing alone, have a discriminatory impact on interstate commerce.[35] Federal preemption, of course, eliminates all dormant commerce clause issues.[36]. And this is surely for the best. As the leading scholarly analysis in the field has found, courts are much less well equipped than agencies to create a vibrant national market: for reasons of expertise, information

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[34]The possibility of such discrimination here is foreshadowed by Congress' insistence in §332(c)(3)(A) that the Commission only approve state rates that are not "unreasonably discriminatory." 47 U.S.C. §332(c)(3)(A).

[35]*See, e.g.*, Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L. J. 425 (1982).

[36]On the intersection of the dormant commerce clause, preemption, and *Chevron*, *see* Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONSTITUTIONAL COMMENTARY 395 (1986).

gathering ability, and democratic accountability, agencies are far better at making interstate commerce policy than are the courts.[37]

Interconnection rates should not be left to the states or to the federal courts. Preemption of those rates is the lawful and appropriate course for the Federal Communications Commission.

[37] *Id.* at 407, 408.